No. 3659

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

OLLIE N. McNAUGHT,

Plaintiff in Error,

vs.

SADIE HOFFMAN,

Defendant in Error.

PETITION FOR RE-HEARING

HOMER G. MURPHY,

Attorney for Plaintiff in Error.

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The plaintiff in error respectfully moves, petitions and submits to this Honorable Court that there is here presented a case in which she may with propriety ask and petition that a re-hearing be granted herein upon the grounds and for the reasons following, to-wit:

I.

In its decision made herein on the 1st day of August, 1921, the Court, agreeing with the Supreme Court of Montana, holds that the instruments involved

herein "created in the grantee (Sadie Hoffman) an estate upon condition subsequent," and then this Court proceeds to decide that under the decisions of the Supreme Court of Montana plaintiff in error cannot recover herein by reason of a construction placed by it on section 4970 of the Revised Codes of Montana in the cases of McDonald v. American Nat. Bank, 25 Mont. 456, and Tatem v. Eglonol M. Co., 45 Mont. 367, although at the same time intimating that the rule as there announced as this Court views said decisions is against the weight of modern authority.

II.

We respectfully submit that the decision in the Supreme Court of Montana in the case of McDonald vs. American Nat. Bank, supra, has by inadvertence been misconstrued by this Court, and a most important part of said decision has been inadvertently overlooked. The Supreme Court of Montana in the McDonald case just before stating that portion quoted in the decision under consideration, laid down the following rule in construing Section 2103 of the Civil Code of Montana, which is now Section 4970 of the Revised Codes of Montana of 1907, saying, pages 494, 495:

> "In so far as they are applicable to the facts of the case at bar, the fundamental principles in the light of which Section 2103, *supra,* should be interpreted may be thus illustrated: An executed

> contract does not require a consideration to support it. *For example, a gift consummated is an executed contract.* But a contract of gift the subject of which is not delivered is *without consideration—a mere nudum pactum—and therefore not enforceable by the donee. The provisions of section 2103* do not embrace gifts not perfected or other executory contracts lacking consideration. It should seem to be manifest that the legislature did not intend to declare that an executory contract in which there is a promise to make a gift or to confer a gratuity upon a third person may be enforced by him." (Italics ours).

the opinion then follows in the words quoted in the opinion in the case at bar, but the Montana court further in the McDonald case on page 495 says:

> "We do not attempt to interpret the section further than the facts in this case seem to require."

The decision in the McDonald case merely holds that an executory contract, such as the one before it in that case, to fall within the provisions of Rev. Codes § 4970, must have a "consideration passing from the third party by virtue of which he may assert the existence of a promise in his favor."

The case of Tatem vs. Englonol M. Co., 45 Mont. 367, 373, was also one in which an executory contract was involved. In neither of said cases was a perfected or consummated gift considered.

Indeed, the Supreme Court of Montana entertained no such view of said section 4970 as is laid down by this court in the case at bar, for in passing upon the question of privity of contract, in the case of West. Loan & S. Co. vs. B. A. Co., 31 Mont. 448, 450, it said:

> "The general, perhaps universal, rule of law is that there must be either contract, or privity of contract, to constitute liability on the part of the abstractor. (*Symns* vs. *Cutler*, 9 Kan. App. 210, 59 Pac. 671). This rule of law is conceded by the appellant. "Privies" are defined as "persons connected together, or having mutual interest in the same action or thing by some relation other than that of actual contract between them." (Black's Law Dictionary, 940). "A contract made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Section 2103, Civil Code; *Burton* vs. *Larkin*, 36 Kan. 246, 13 Pac. 398, 59 Am. Rep. 541; *McLaren* vs. *Hutchinson*, 22 Cal. 187, 83 Am. Dec. 59).
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> "The evidence in this case, being admitted for the purpose of this motion to be true, tends not only to establish privity of contract, but an actual contract, between the plaintiff and defendant with respect to this abstract. The defendant knew that the abstract was made for the exclusive benefit and use of plaintiff, and knew that the plaintiff would rely thereon, and the abstract

was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant if the action can be maintained. (*Brown* vs. *Sims*, 22 Ind. App. 247, 53 N. E. 779, 72 Am. St. Rep. 308)."

See also the very latest views of the Supreme Court of Montana on Section 4970 in the case of McKeever vs. Oregon Mtge. Co., 198 Pac. Rep. 750, decided June 6, 1921.

In this case we have a completed gift of the contract between Mrs. Smith and Mrs. Hoffman, in which Mrs. Hoffman in consideration of the deed to her promises to pay certain money. The contract between those ladies was and is a chose in action which provided for certain monthly payments and the gift of that contract was as completely made by Mrs. Smith to plaintiff in error as any gift of that nature could be (See 12 Ruling Case Law, Title, Gifts: Nos. 18 to 24; 27), and knowledge of said gift was not only admitted but acquiesced in and consented to by Mrs. Hoffman by the payments she made to plaintiff in error for many months after the acceptance of the deed and the execution of the contract between herself and Mrs. Smith. A gift under the laws of the State of Montana is irrevocable and Mrs. Hoffman, by her conduct as admitted herein, is clearly estopped, under every principle of the doctrine of estoppel, from now asserting that there was no privity between Mrs. McNaught and Mrs. Smith. And its continued effective-

ness could not be infringed upon by any one other than plaintiff in error. A completed gift is recognized as property, the right to which cannot be taken away without due process of law, how much less so can it be taken away by any letter from Mrs. Smith, admittedly not founded upon any consideration, and written without the knowledge or consent of Mrs. McNaught. The contract furnishes a basis for the collection of $50.00 per month "for an unlimited time," and presumably meant either until the remarriage or death of Mrs. Hoffman, or until the death of plaintiff. The mere fact that the money was payable monthly, in the future, cannot be considered upon the question as to whether the gift was completed by the making of the contract because the right to collect this money was clearly given by it. The defendant could raise no question as to the delivery of this gift, because she had recognized and acquiesced in such delivery by the payment of the money due thereunder for the period of seven months.

The case of Ebel vs. Piehl, 95 N. W. 1004 (Mich.) is illustrative of this case and is as follows: In said case a father transferred to a son a house and lot and $1500 in cash. The son agreed to pay his sister $400 upon the death of the father, and orally promised the sister, in the presence of the father, to do so. After the father's death he discharged a mortgage against his sister's property for $196, and refused to pay the balance of the $400. The sister brought suit in as-

sumpsit on the common counts to recover the balance. The court held that the promise of defendant to the father was a chose in action which he could transfer and says:

> "In our judgment a fair construction of the conversation which occurred between the parties to this suit and the father after the property was received by the defendant, warrants, if it does not compel the conclusion that the father *did transfer to the plaintiff this cause of action.* This is not a case of a gift *in futuro*, and therefore is not subject to the law governing such gift. *Between the father and the plaintiff there was a gift—a gift of a promise to pay money in the future—of an existing cause of action.*" (Italics ours).

The court held that the sister might maintain the action against her brother.

If there was no other consideration from defendant in error to Mrs. Smith for such life estate than the promise to pay the $50.00 a month to plaintiff, as is admitted, then such payment is surely a valid consideration for the deed, and to allow Mrs. Hoffman to retain the property without the payment of the consideration, would be violative of every right of property.

By the assertion of Mrs. Hoffman in the Montana case, and by the decision of the Supreme Court of that

State based upon her contentions, the possibility of losing the life estate, as resulting from this non-payment, was forever removed from the contract. If she is correct in her present assertions, the result is that although she accepted to estate on a consideration that she should pay the $50.00 per month, she is released therefrom and holds the estate absolutely for life, on the letter from Mrs. Smith, which, we repeat, was admittedly not founded on a consideration, and to which Mrs. McNaught never assented, nor indeed knew of.

By the theory of defendant's counsel she willingly accepted the conveyance of this property upon *the consideration named*, or *subject to the charge against it*, and yet they now insist that she can abrogate or repudiate this condition without any payment of the consideration and hold the charged estate absolutely. In other words, she claims all the benefit and declines to assume any of the burdens which were imposed on her, and which she accepted and agreed to comply with.

If the payments to the plaintiff in error were not the consideration for the deed, but the transfer from Mrs. Smith to defendant in error was a gift, unquestionably it was a gift upon condition, and if defendant in error accepted and retains it she is bound to satisfy the condition. Such condition becomes a charge upon the estate which must be considered in the nature of an equitable lien.

No theory is advanced by defendant in error as to the manner or circumstances under which she procured this title to the above subject other than above suggested. It therefore must be treated either as an absolute gift or a sale to her by Mrs. Smith upon a valuable consideration. Taking either horn of this dilemma places Mrs. Hoffman entirely out of court in this case. If it was a gift, an absolute condition of the payment of $50.00 per month to plaintiff, was charged upon it. If it was transferred to her for a valuable consideration the only consideration, as the Supreme Court of Montana says, was that she should pay the $50.00 per month to plaintiff. In either case the $50.00 per month was absolutely agreed to be paid by her, and has never been legally abrogated.

The situation here presented certainly must affect the equitable consideration of the court. There is nothing in the record indicating the value of the property transferred other than it is apparent that it was a hotel building located in a prominent growing city of the State of Montana. Its actual value is perhaps immaterial. Certainly she must have considered it a valuable piece of property whereby she might obtain her livelihood and pay plaintiff the sum of $50.00 per month.

For these reasons it is most respectfully submitted that a re-argument of the case be had or that the decision of this Court should be that the judgment of

the District Court be reversed and the case remanded with directions to enter judgment for plaintiff in error.

HOMER G. MURPHY,
Attorney for Petitioner.

The undersigned, counsel for plaintiff in error, certifies that in his judgment the foregoing petition for re-hearing is well founded and that it is not interposed for delay.

(Signed) HOMER G. MURPHY,
Attorney for Plaintiff in Error.